

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>FIDEL GOMEZ</b>	)	
Claimant	)	
VS.	)	
	)	
<b>NATIONAL BEEF PACKING CO.</b>	)	Docket No. 1,039,186
Respondent	)	
AND	)	
	)	
<b>ZURICH AMERICAN INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appealed the March 1, 2013, Award entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on June 4, 2013.

**APPEARANCES**

Diane F. Barger of Wichita, Kansas, appeared for claimant. Shirla R. McQueen of Liberal, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, respondent agreed that Exhibit 5 of Dr. George G. Fluter's deposition transcript is inadmissible. Therefore, it is unnecessary to address the issue raised by claimant at page 27 of his brief. The parties stipulated at oral argument that claimant sustained an 11% functional impairment to the right upper extremity at the level of the shoulder. The parties also stipulated that if the Board found claimant sustained a neck injury arising out of and in the course of his employment with respondent and had a whole body functional impairment as a result of the neck injury, claimant sustained a 5% whole person functional impairment for the neck injury. The parties also agreed that claimant's July 19, 2012, deposition transcript in Docket No. 1,039,183 is part of the record in this claim.

### ISSUES

In the March 1, 2013, Award, ALJ Fuller found claimant sustained a right shoulder injury only as a result of a December 27, 2007, accident and awarded claimant benefits for an 11% functional impairment to the right shoulder. The ALJ determined claimant failed to prove that it is more probably true than not that his cervical and upper back conditions are a result of his work accident.

Claimant contends he sustained injuries to his right upper extremity, cervical spine region and upper back while employed by respondent. Claimant asserts Dr. Fluter's opinions are the most credible, as is the task list of Doug Lindahl. Claimant argues Karen Crist Terrill's task list is flawed and Dr. Terrence Pratt's opinions are less than credible. Claimant maintains he has a work disability and requests benefits for the same.

Respondent contends claimant suffered a scheduled injury to his right shoulder only and requests the Board affirm ALJ Fuller's Award. Respondent also objects, as hearsay, to Dr. C. Reiff Brown's findings being made part of the record.

The issues before the Board on this appeal are:

1. Should references to the findings and opinions of Dr. Brown be excluded from the record?
2. What is the nature and extent of claimant's disability? Did claimant sustain a work-related neck and/or upper back injury that resulted in a permanent whole body functional impairment or is claimant's functional impairment limited to the right shoulder?
3. If claimant sustained a work-related neck and/or upper back injury, what is the nature and extent of his disability?
4. If the Board finds claimant sustained a compensable neck and/or upper back injury, should claimant's injuries be combined into a whole body functional impairment?

### FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant's original Application for Hearing indicated that he injured his right shoulder and listed the cause of the accident as working in meat packing. Claimant listed the date of accident as: "A series of micro traumas ending with an identifiable injury on or about

12-2007, and continuing each working day thereafter.”<sup>1</sup> On June 17, 2008, claimant filed an amended Application for Hearing, and changed the date of accident to December 27, 2007, and the cause of the accident as running a CO<sub>2</sub> gun. On January 6, 2011, claimant filed a second amended Application for Hearing and changed the date of accident to on or about February 1, 2008, and each working day thereafter and the cause of accident as working in meat packing pulling a cow’s stomach. The extent of injuries was amended to right upper extremity, including hand, elbow, shoulder, neck/upper back and all parts affected by injury. On December 21, 2011, claimant filed a third amended Application for Hearing and changed the date of accident to a series of accidents beginning on or about December 27, 2007, and ending on or about February 1, 2008, and each working day thereafter and the cause of accident as working in meat packing using an air gun and laboring in a packing plant.

Claimant does not speak English, and a Spanish interpreter was used each time claimant testified.

At his June 4, 2008 deposition, claimant testified he began working for respondent on December 2, 1998. Claimant often confused his right shoulder injury and a left shoulder injury that resulted in Docket No. 1,039,183. Claimant testified that he injured his right shoulder in December 2007 when he shot cow carcasses with a CO<sub>2</sub> gun and also in April 2007, when he was working on a drum to pull out a cow’s stomach. Claimant indicated that he had been performing the CO<sub>2</sub> job for all of December 2007. Before he started the CO<sub>2</sub> job, claimant experienced some pain in his right shoulder, but after performing the CO<sub>2</sub> job, he could not lift his arm due to pain. During the June 4, 2008, deposition, claimant was not asked if he had sustained a neck injury, nor did he volunteer that he sustained a neck injury.

At his July 19, 2012, deposition in Docket No. 1,039,183, claimant testified that in May or June 2010, his “paleta,” neck and back started hurting. When asked what part of his body the paleta was, claimant pointed to the middle of his shoulder, or shoulder blades. Claimant indicated that he cannot sleep on either side, so he sleeps in a chair. When claimant slept in the chair, his neck was always straight, causing his neck and shoulder blades to begin hurting. The neck and shoulder pain has been constant since it began. On cross-examination, claimant testified:

Q. (Ms. McQueen) But did I understand that your last day of work at National Beef was May 20, 2009?

A. (Claimant) Yes.

Q. And that your neck and shoulder blades did not start hurting until about a year after you left National Beef?

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<sup>1</sup> Application for Hearing (filed Mar. 13, 2008).

A. Yes, in 2010.

Q. All right. So, when you injured your left shoulder on November 16, 2007, you did not injure your neck on that date, is that correct?

A. No. Not the same day, no.<sup>2</sup>

. . . .

Q. What were you doing, Mr. Gomez, when your neck started hurting?

A. I was laying down. Like I said, I couldn't sleep on either side, on the right or the left.<sup>3</sup>

At the regular hearing, claimant's testimony was centered on the job tasks he performed for respondent and the work he performed after leaving respondent's employment. After injuring his left shoulder in November 2007, claimant was assigned to a job injecting beef carcasses with a CO<sub>2</sub> gun, where he used only his right hand. After recovering from a February 23, 2008, left shoulder surgery by Dr. Suhail Ansari, he returned to work for respondent, and for a month, he was placed in a job washing helmets and sewing gloves. He also worked as a picker, where he would pick pieces of fat off a conveyor belt.

Pursuant to an agreed order by the parties, claimant was evaluated by Dr. Paul S. Stein, who saw claimant one time on February 23, 2010. According to Dr. Stein's report, claimant initially could not recall if his left or right shoulder injury occurred first, but subsequently indicated the right shoulder began hurting first. From claimant's medical records from Dr. Ansari, Dr. Stein learned that claimant sustained his left shoulder injury in November 2007, and his right shoulder injury on February 1, 2008. Claimant had a left shoulder rotator cuff repair by Dr. Ansari in February 2008, and received conservative treatment for the right shoulder. Claimant had substantial restriction of left shoulder movement, but no significant pain. Claimant believed the left shoulder surgery was unsuccessful. He also reported persistent pain in the right shoulder and right shoulder blade. At that time, Dr. Stein did not believe claimant to be at maximum medical improvement and he was not seen again.

Upon Dr. Stein's recommendation, claimant underwent a CT Injection/Arthrogram and MR Arthrogram of both shoulders. After reviewing the diagnostic test results, with regard to claimant's right upper extremity, Dr. Stein indicated claimant had findings

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<sup>2</sup> Claimant Depo. (July 19, 2012; Docket No. 1,039,183) at 14.

<sup>3</sup> *Id.* at 20.

compatible with a full-thickness rotator cuff tear and acromioclavicular joint arthropathy with impingement on the supraspinatus tendon.

Dr. Stein testified that claimant made no complaints of neck pain. Dr. Stein examined claimant's neck and went through a range of motion with claimant, palpated the neck and observed the neck for spasm and curvature. Claimant's neck did not spasm, his range of motion was normal and Dr. Stein did not find any focal tenderness. Dr. Stein testified that he also looked at claimant's neck flexion, extension, bending and rotation. Dr. Stein opined claimant should see an orthopedic surgeon for treatment of the right shoulder and left carpal tunnel syndrome.

At the request of his attorney, claimant was evaluated by Dr. George G. Fluter on November 11, 2010. Claimant reported to Dr. Fluter of having pain affecting the neck/upper back, both shoulders and right infrascapular portion of the middle back, as well as numbness in his left hand and weakness in both hands. Dr. Fluter indicated that his physical examination of claimant revealed tenderness to palpation associated with taut bands of muscles of the neck/upper back, upper shoulders and scapular stabilizers bilaterally, more so on the left. He determined that claimant's cervical range of motion was limited in all planes with pain at the end range. Dr. Fluter diagnosed claimant with left shoulder pain/impingement; left shoulder internal derangement; status post left shoulder arthroscopy; status post incision and drainage of infected arthroscopy portal; left shoulder adhesive capsulitis; status post left shoulder manipulation; right shoulder pain/impingement; right shoulder internal derangement; neck/upper back/right shoulder girdle pain; neck/right upper back/right shoulder girdle sprain/strain; and left medial epicondylitis.

With regard to claimant's functional impairment, Dr. Fluter opined pursuant to the *Guides*<sup>4</sup> that claimant had:

- a 15% functional impairment to the left shoulder for range of motion deficits and a 2% impairment for clinical findings of medial epicondylitis at the left elbow. Those were combined for a 17% left upper extremity impairment.
- a 12% functional impairment to the right shoulder for range of motion deficits.
- a 5% whole body impairment for myofascial pain in accordance with DRE Cervicothoracic Spine Impairment Category II.
- a 20% whole body functional impairment when the left upper extremity, right upper extremity and cervical spine are combined.

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<sup>4</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Fluter recommended restrictions for claimant. The doctor reviewed the task list prepared by Doug Lindahl. Dr. Fluter determined that the claimant was unable to perform 18 of the 25 tasks listed for a 72% task loss.

On cross-examination, the following exchange took place between respondent's counsel and Dr. Fluter:

Q. (Ms. McQueen) Is there any way to testify within a reasonable degree of medical probability or certainty here today that Mr. Gomez's neck injury was due to the February 1st, 2008, accident or something that happened after he terminated his employment?

A. (Dr. Fluter) Okay. As far as specifically the neck itself, no. With regard to the shoulder girdle, based on a description that he had given me, I think the shoulder girdle was involved before that. And based on the description I think at the time of the injury to the right shoulder.<sup>5</sup>

Dr. Fluter opined claimant can have pain in the neck because the upper trapezius attaches to the base of the skull and the cervical spine, upper thoracic spine, and rhomboids, which are a musculature that goes from the cervical spine and upper thoracic spine to the shoulder blade.

Claimant's attorney asked Dr. Fluter if based upon the reports of Drs. C. Reiff Brown and Stein, whether it was more probable than not that the muscles in the scapular and trapezius areas would have contributed to, if not caused, the myofascial pain claimant experienced in the cervical area. Respondent's attorney objected that there was a lack of foundation and that a recitation of Dr. Brown's report was hearsay.

Pursuant to ALJ Fuller's April 15, 2011, Order, Dr. Terrence Pratt performed an independent medical evaluation (IME) of claimant on July 14, 2011. In his report, Dr. Pratt indicated that he had been asked to address claimant's 2007 event where he reported a series involving the left hand, elbow, shoulder, neck and upper back as well as a 2008 event where claimant reported a series involving the right upper extremity, hand, elbow, shoulder, neck and upper back. Dr. Pratt indicated claimant presented with discomfort in the shoulders, cervical region, thoracic region and left hand to his elbow, as well as developing symptoms after a shoulder procedure from his left hand to the forearm. Dr. Pratt understood claimant believed he had neck involvement from the beginning of claimant's accident history. Dr. Pratt testified that in 2007, claimant reported injuring his right upper extremity, primarily at the shoulder, and his neck or cervical region. Claimant reported developing left shoulder to cervical region symptoms when he attempted to prevent a cart carrying beef from falling over. Dr. Pratt testified:

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<sup>5</sup> Fluter Depo. at 38.

He also had cervical symptoms, right thoracic discomfort, which he describes as his lungs, and he had symptoms from his left hand to his elbow. And he stated that all of his symptoms related to a 2007 event.

But then he went on to describe that event as lifting a part of a cow when he noted right shoulder pain. And then stated in 2009 *[sic]* when the cart fell over, he developed left shoulder symptoms to his cervical region.<sup>6</sup>

Dr. Pratt testified that on the basis of the history given to him by claimant and the legal documentation presented to him, he concluded that claimant's neck injury was work related. When Dr. Pratt was informed that claimant testified on July 19, 2012, that he started having pain in his neck and shoulder blades in May or June 2010, Dr. Pratt indicated that was not consistent with what he was told by claimant during the evaluation. Dr. Pratt acknowledged that claimant made no complaints of cervical symptoms to Dr. Stein in 2010. Dr. Pratt indicated that he could not relate the neck injury to activities in 2007 or 2008 if the claimant testified in 2012 that he did not start to have involvement of his cervical region until 2010.

Dr. Pratt explained that the shoulder girdle consists of the trapezius, infraspinous and supraspinous muscles. Primarily, the trapezius muscle goes all the way into the cervical region and upper back. Dr. Pratt also testified that the musculature of the shoulder girdle extends over the upper thoracic region.

After reviewing Dr. Brown's report, Dr. Pratt was asked if Dr. Brown found tenderness in the front of the right shoulder to the AC joint, the upper trapezius and down to the supraspinous and infraspinous musculature. Respondent's attorney objected to any reference to Dr. Brown's report being part of the record.

Dr. Pratt gave two opinions on functional impairment. If claimant's neck condition was work related, using the *Guides*, Dr. Pratt opined that for the left upper extremity, claimant had a 13% functional impairment; for the right upper extremity, a 7% functional impairment; and for the cervicothoracic region, a 5% impairment. Utilizing the Combined Values Chart, Dr. Pratt opined claimant had a 23% whole person impairment. He then assigned claimant permanent restrictions. However, if claimant's neck condition was not work related, Dr. Pratt opined claimant would have a 22% left upper extremity functional impairment and an 11% right upper extremity functional impairment, both at the level of the shoulder.

Dr. Pratt reviewed rehabilitation consultant Karen Crist Terrill's task list and opined claimant would be unable to perform 12 of 34 nonduplicative tasks, for a 35% task loss. If the testimony of respondent's assistant safety manager, Ray Dee Rinehart, was accurate, three tasks would be eliminated, which would leave 31 tasks of which claimant

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<sup>6</sup> Pratt Depo. at 8.

could no longer perform 12 for a 38.7% task loss. If the weight limits were as Mr. Rinehart testified, then claimant would be unable to perform 11 out of 31 tasks for a 35.48% task loss. Dr. Pratt also reviewed a task list prepared by vocational expert Doug Lindahl and indicated that claimant was unable to perform 19 out of 25 tasks for a 76% task loss.

Four other witnesses testified in this matter. Mr. Lindahl and Ms. Terrill testified primarily concerning the job tasks claimant performed in the 15 years prior to claimant's accidents that resulted in his left and right shoulder injuries. Mr. Rinehart testified regarding the jobs claimant performed at respondent and the tasks required to perform those jobs. Claimant's daughter, Marlene Aquino, was deposed twice. At her July 19, 2012, deposition, Ms. Aquino testified that after claimant's left and right shoulder injuries, he sold all of his farm animals, because he could not care for them. According to Ms. Aquino, claimant would have to sleep in a chair because of pain and was not able to turn his neck in order to drive a motor vehicle. Claimant told Ms. Aquino of having pain in his shoulders and neck.

ALJ Fuller found claimant's functional impairment was limited to the right shoulder, stating:

The claimant has failed to prove by a preponderance of the credible evidence that it is more probably true than not true that his cervical and upper back conditions are as a result of his industrial accident. Therefore, after review of all the evidence presented, it is found that the claimant suffers an 11% permanent partial impairment to the right upper extremity at the level of the shoulder based on Dr. Pratt's opinion which is found to be the most reliable as he is the independent medical examiner and conducted the most recent evaluation.<sup>7</sup>

#### **PRINCIPLES OF LAW AND ANALYSIS**

The Board will first address respondent's objection that any reference to Dr. Brown's opinions and findings should not be allowed as part of the record. K.S.A. 44-519 provides:

Except in preliminary hearings conducted under K.S.A. 44-534a and amendments thereto, no report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

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<sup>7</sup> ALJ Award at 8.



In *Boeing Military Airplane Co.*,<sup>8</sup> Drs. Schlachter and Zimmerman testified that they used medical records of other physicians that were not admitted into evidence and who did not testify. The Fund contended that, because the doctors generating the past medical records of claimant did not testify, those past records were inadmissible under K.S.A. 44-519. The Kansas Court of Appeals disagreed, stating:

K.S.A. 44-519 has no application to the testimony of Dr. Schlachter and Dr. Zimmerman. The statute literally applies only when a party seeks to introduce a report or certificate of a physician or surgeon into evidence. In the present case, no report or certificate prepared by an absent, nontestifying physician or surgeon was introduced into evidence. Neither Dr. Schlachter nor Dr. Zimmerman attempted to “bootleg in” the opinion of an absent, nontestifying doctor by merely reading from the other doctor’s report. See, e.g., *Mesecher v. Cropp*, 213 Kan. 695, 701-02, 518 P.2d 504 (1974). Although each doctor relied in part on the reports of the absent doctors in forming his opinion, each doctor, when testifying, expressed his own opinion and not that of the absent, nontestifying doctors.<sup>9</sup>

Accordingly, the Board finds the reference to the opinions and findings of Dr. Brown is part of the record. Drs. Pratt and Flutter merely formulated their opinions using Dr. Brown’s report, opinions and findings. Claimant never offered to place Dr. Brown’s written report into evidence.

K.S.A. 2007 Supp. 44-501(a) states in part: “In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant’s right to an award of compensation and to prove the various conditions on which the claimant’s right depends.”

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: “Burden of proof means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.<sup>10</sup>

The Board concurs with ALJ Fuller that claimant failed to prove by a preponderance of the evidence that he sustained a neck or upper back injury by accident arising out of and

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<sup>8</sup> *Boeing Military Airplane Co. v. Enloe*, 13 Kan. App. 2d 128, 764 P.2d 462 (1988), rev. denied 244 Kan. 736 (1989).

<sup>9</sup> *Id.* at 130-131.

<sup>10</sup> *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

in the course of his employment with respondent. Claimant presented insufficient evidence to prove his allegations that he sustained neck and upper back injuries arising out of and in the course of his employment with respondent. ALJ Fuller's finding is supported by the July 19, 2012, deposition testimony of claimant that his neck and shoulder blades did not begin hurting until a year after his last day working for respondent. Claimant's own expert witness, Dr. Fluter, indicated that he could not state within a reasonable degree of medical probability or certainty that claimant's neck injury was work related.

Dr. Pratt, who performed a court-ordered IME, initially opined claimant's neck condition was work related. However, after learning that claimant testified he did not have neck involvement until 2010, Dr. Pratt could not relate claimant's neck condition to his 2007 or 2008 work activities.

Claimant argues that the trapezius, infraspinous and supraspinous muscles attached to the shoulder girdle extend into the neck and upper back. Claimant then reasons that since he injured his shoulder girdle and trapezius and has pain in his neck, that he sustained a neck injury that resulted in a permanent impairment. The flaw in claimant's logic is that he had no neck pain until about a year after he no longer worked for respondent. Dr. Stein testified that when he saw claimant on February 23, 2010, claimant made no complaints of neck pain. It is significant that Dr. Stein examined claimant's neck and found no spasm or focal tenderness and a normal range of motion.

### CONCLUSION

1. Respondent's objection to any reference to Dr. Brown's opinions and findings being allowed in the record is overruled.

2. Claimant has an 11% functional impairment to the right upper extremity at the level of the shoulder.

3. Claimant failed to prove by a preponderance of the evidence that he sustained a neck or upper back injury by accident arising out of and in the course of his employment with respondent.

4. The nature and extent of claimant's disability for a whole body injury is moot.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>11</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

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<sup>11</sup> K.S.A. 2012 Supp. 44-555c(k).

**AWARD**

**WHEREFORE**, the Board affirms the March 1, 2013, Award entered by ALJ Fuller.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August, 2013.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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